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The Supreme Court of the United States.

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JAMES H. McKENNEY,
Clerk.

CHARLES H. SHAW, Trustee; THE UNION LIGHT, HEAT & POWER COMPANY and THE SUBURBAN ELECTRIC COMPANY,

Appellants,

versus

THE CITY OF COVINGTON et al.,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Brief for Appellants on the Separate Motions of Appellees to Dismiss and to Affirm.

MILLER OUTCALT,
RICHARD P. ERNST,
ALFRED C. CASSATT,
Attorneys for Appellants.

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THE SUPREME COURT OF THE UNITED STATES.

CHARLES H. SHAW, Trustee; THE UNION LIGHT, HEAT & POWER COMPANY and THE SUBURBAN ELECTRIC COMPANY,

Appellants,

vs.

THE CITY OF COVINGTON et al,

Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

Brief for Appellants on the Separate Motions of Appellees to Dismiss and to Affirm.

STATEMENT OF FACTS.

The facts in this case, so far as they bear upon the questions involved in these two motions, are as follows:

On April 22d, 1882, the General Assembly of the State of Kentucky passed an act giving to The Covington Electric Light Company an exclusive franchise to furnish electric light to the City of Covington and its inhabitants for a period of twenty-five years (Record, 126).

Thereafter the company organized and commenced to furnish electric light to the City of Covington and its inhabitants.

On April 5th, 1893, a general corporation act was passed providing for the organization and regulation of corporations. In that act was the following provision (Sec. 573, Ky. Stat.):

> "The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897."

On April 11th, 1894, The Covington Electric Light Company consolidated with The Citizens' Electric Light Company, of Dayton, Kentucky, and The Suburban Electric Illuminating, Heating & Power Company, of Newport, Kentucky, under the name of The Suburban Electric Company. This was done under the authority of Sections 555 *et seq.* of the Kentucky Statutes. Section 556 is as follows:

> "When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, the separate existence of the constituent corporations shall cease, and the consolidated corporations shall become a single corporation in accordance with the said agreement, and subject to all the provisions of this chapter and other laws relating to it, and shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities."

This consolidation carried to the new company the exclusive franchise of The Covington Electric Light Company, and the new company carried on in Covington, up to the bringing of this suit, the business of public and private electric lighting, having, among other things, a contract with the City of Covington to light certain streets, alleys and public places of the city. A short time before the beginning of this suit The Suburban Electric Company was adjudged a bankrupt in the United States District Court in the District of Kentucky, and Charles H. Shaw was duly elected and qualified as trustee. The said trustee continued the business of the said Suburban Electric Company, and con-

tinued to furnish light to the City of Covington under the contract then existing between the City of Covington and The Suburban Electric Company and to private consumers in said city.

Some time in the year 1900 the City of Covington conceived the idea of building a municipal lighting plant under the alleged authority of the city charter of Covington, and authorized the issue of bonds for said purpose. Thereupon Charles H. Shaw, trustee of The Suburban Electric Company, filed his bill herein to enjoin said action on the part of the City of Covington. A preliminary injunction was granted. A demurrer to the bill was filed by the defendants, raising the principal questions in the case and the questions upon which the case was afterwards finally decided. Said demurrer, upon full argument, was overruled by Judge Evans.

Thereafter, and before the trial of this cause, the bankruptcy proceedings were terminated and The Suburban Electric Company was restored to its property and franchise. It thereupon transferred this franchise, through an intermediary company, to The Union Light, Heat & Power Company, a corporation under the laws of Kentucky. Thereupon, The Union Light, Heat & Power Company filed its motion for leave to file a bill in the nature of supplemental bill and to become a party complainant, which was granted and the bill filed. Thereafter the evidence was taken and the cause argued and submitted to the court.

Upon an intimation by the court in its first opinion upon submission that The Suburban Electric Company had not the power to transfer its franchise to The Union Light, Heat & Power Company, and that the attempted transfer was therefore ineffective (although the court expressly withheld a decision on that point; Record, page 76, fourth line from bottom), The Suburban Electric Company filed its motion for leave to file bill in the nature of supplemental bill, and to become a party complainant. Its motion was granted, and the bill filed. Thereafter the court entered judgment dismissing the bill of complaint and denying the relief prayed for upon the grounds set forth in its two opinions (Record, pages 42, 77). The decree dismissing the bill was entered on October 14th, 1902. Thereupon, on the

same day an appeal was allowed to the Circuit Court of Appeals. An assignment of errors was filed and a bond approved. The citation was issued and later the transcript was filed in the Circuit Court of Appeals. Thereafter the complainants, being the appellants in the Court of Appeals, became convinced that the Circuit Court of Appeals had no jurisdiction of the case on appeal, and so informed the Circuit Court of Appeals before the argument of the case, and filed their motion in said Circuit Court of Appeals to dismiss their appeal, for lack of jurisdiction thereof in said court, and without prejudice.

Thereupon, the Court of Appeals granted said motion for leave to dismiss the appeal. The order of the Circuit Court of Appeals, a certificate of which was transmitted to and filed in the Circuit Court on December 15, 1902, is as follows (Rec., 190):

> "In this cause, the motion heretofore entered by the appellant for an order dismissing this appeal for lack of jurisdiction thereof in this court and without prejudice, and for leave to withdraw the record herefrom, came on this day to be heard and was argued by counsel for the appellant in support thereof and by counsel for the appellee in opposition thereto, and upon consideration thereof, it appearing to this court that the said appeal was taken to this court by inadvertance, it is ordered that so much of said motion as prays for leave to dismiss said appeal be granted and the said appeal is therefore now dismissed; and it appearing that the transcript on said appeal has now been filed and the cause docketed in this court, it is further ordered that so much of said motion as prays for leave to withdraw the record from this court be denied.
>
> "And it is also further ordered that the motion herein filed by the appellees on the 11th day of December instant, for an order affirming the decree of the Circuit Court in this case be denied."

Thereupon, on December 23d, 1902, the complainants filed in the Circuit Court a petition for appeal and assignment of errors, and prayed an appeal to the Supreme Court of the United States, which appeal was allowed, the appeal bond fixed and given. The assignment of errors appears on pages 192–193 of the record. The transcript on appeal was regularly filed in this court within the time required by law.

The appellees have served upon the appellants printed copies of (1) a motion to dismiss; (2) a separate motion to affirm.

I.

The Motion to Dismiss.

The motion is entitled "Motion to Dismiss Appeal for Want of Jurisdiction." The sole ground of the motion, as therein stated, is as follows:

> "Because the United States Circuit Court for the Eastern District of Kentucky has no power or authority in law to grant an appeal to this honorable court, after granting an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and said appeal being there dismissed."

The jurisdiction of the court below, and the relief sought, were based on the claim of the complainant that its franchise—a contract between it and the state of Kentucky—was about to be violated by the action of the City of Covington, under the alleged authority of legislation of the state of Kentucky known as the charter of Covington.

The proposed action of the City of Covington was sought to be enjoined on the ground that it was a violation of that clause of the United States Constitution which prohibits a state from passing any law impairing the obligation of a contract. This was the ground, and the sole ground, of Federal jurisdiction in this case. That it is a sufficient ground was held by this court in the following cases:

The New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S., 650.
The Louisville Gas Co. v. *The Citizens Gas Co.*, 115 U. S., 683.
The New Orleans Water Works Co. v. *Rivers*, 115 U. S., 674.

That the action of a municipality is, for the purposes of such a question, the action of the state itself, was decided by this court in the case of *The City Railway Company* v. *The Citizens Street Railroad Company*, 166 U. S., 557.

The Circuit Court decided that it had jurisdiction of this case upon the ground above set forth (Record 77).

The court decided against the plaintiff on two grounds: First, that the exclusive feature of the franchise stood repealed by Section 573 of the Kentucky Statutes above quoted, as of September 28, 1897; and, second, that the exclusive feature of the franchise was lost in the consolidation proceedings in which The Covington Electric Light Company became merged with The Citizens Electric Light Company and The Suburban Electric, Illuminating, Heating & Power Company. The court having decided against the plaintiff upon the question in the case, viz., the impairment of the obligation of the contract, the plaintiff had a right to appeal to this court.

The appellate jurisdiction of this court in such a case is exclusive.

This has been recently decided, in a similar case, by the Circuit Court of Appeals of the Sixth Circuit, of which the state of Kentucky is a part.

> *The City of Owensboro* v. *The Owensboro Water Works Co.*, 115 Fed., 318.

It has been decided by this court in numerous cases, one of the most recent being the case of *The Huguely Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S., 290, where the court says:

> "If the jurisdiction of the circuit court rests solely on the ground that the suit arises under the Constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive."

It is unnecessary to cite further authorities to show that this court has jurisdiction to hear this case upon appeal, and that such jurisdiction is exclusive, for the reason that the principle is well settled, and for the further reason that appellees admit in their brief on this case (page 4) that the Circuit Court of Appeals had no jurisdiction to hear this case on appeal.

The appeal, therefore, which was taken to the Circuit Court of Appeals, was a nullity from beginning to end, and did not deprive the Judge of the Circuit Court of the power to grant an appeal to this court, nor deprive the appellants of the right to an appeal to this court.

This exact question was decided by the Supreme Court of Louisiana in the case of *McWilliams* v. *Michel et al*, 43 La. Ann., 984. The syllabus of that case is as follows:

> "When an appellant applies for and obtains an order of appeal to a court having no jurisdiction of the matter in dispute, the order is a nullity. He is not estopped from presenting his appeal in a court of competent jurisdiction."

The same question has been, in effect, passed upon by this court in the case of *The Excelsior Wooden Pipe Co.* v. *The Pacific Bridge Co.*, 185 U. S., page 282. In that case the court below had dismissed a bill on the ground that the court was without jurisdiction to hear the case. Thereupon plaintiff appealed to the Circuit Court of Appeals, which dismissed the case upon the ground that it had no jurisdiction over the appeal, which should have been taken to the Supreme Court. Thereupon the mandate of the Circuit Court of Appeals having been filed in the Circuit Court, another appeal was taken from the Circuit Court directly to this court.

This court proceeded to hear the case on appeal, and reversed the judgment of the Circuit Court, thus upholding its appellate jurisdiction, even though a void appeal had first been taken to the Circuit Court of Appeals.

Even if the first appeal is a valid appeal, nevertheless, if it be withdrawn by appellant before a hearing, the right to a new appeal is not prejudiced.

In the case of *Ward* v. *Hollins*, 14 Maryland, 158, the syllabus is as follows:

> "If an appeal be prayed and allowed, and then withdrawn by the appellant's order, he is not thereby precluded from afterwards prosecuting an appeal in the same case, providing it is done within the time limited by law."

The authorities cited by counsel for the appellees are cases in which a valid appeal was taken and was pending in the appellate court, and where, in spite of this fact, some effort was made to take action in the court below while the valid appeal was still pending. They are none of them authority for the proposition

that the power of the court to grant an appeal is exhausted when an appeal is allowed, but not prosecuted to judgment. This court has held in numerous cases that where an appeal is dismissed in this court, on some other ground than the merits, another appeal may be taken to this court unless, of course, this court should hold, in dismissing the appeal, that it had no authority to entertain any appeal in the case in question.

In the case of the *Steamer Virginia* v. *West*, 19 Howard, 182, the court, by Chief-Justice Taney, said :

> "The transcript must be filed in this court, and the case docketed at the term next succeeding the appeal, in order to give this court jurisdiction. This case must therefore be dismissed.
>
> "But the dismissal does not bar the appellant from taking and prosecuting another appeal at any time within five years from the date of the decree, provided the transcript is filed herein and the case docketed at the term next succeeding the date of such second appeal."

In the case of *Evans* v. *State Bank*, 134 U. S., page 330, the court, by Mr. Chief-Justice Fuller, used the following language :

> "A motion is now made to dismiss the appeal, upon the grounds that it could not be granted, because the court had exhausted its power by the allowance of the first appeal, and because, if this were not so, the second appeal was not taken within two years from the entry of the decree. As to the first of these grounds, it may be remarked that when the term elapsed at which the first appeal was returnable, without the filing of the record, that appeal had spent its force, and the matter was open to the taking of a second appeal, as it would have been if appellee had docketed the cause and had it dismissed."

See, also, to the same effect :

Yeaton v. *Lenox*, 8 Peters, 123.
U. S. v. *Curry*, 6 Howard, 110, 113.
United States v. *Depacheco*, 20 Howard, 261.

The cases above quoted and cited are, we think, an answer to the proposition of appellees that the court had exhausted its power by the allowance of the appeal to the Circuit Court of Appeals.

There have been cases in the Federal courts where, in view of a doubt on the part of counsel as to the proper appellate tribunal, appeals have been allowed to two courts, and both allowed to stand until it was authoritatively decided which court had appellate jurisdiction.

In *Pullman Palace Car Company* v. *Central Transportation Company*, 76 Fed., 401, the appellant having taken an appeal to this court, and being in doubt whether this court or the Circuit Court of Appeals had jurisdiction, took a second appeal to the Circuit Court of Appeals. The latter court declined to dismiss the appeal, pending the decision of this court. In this court (171 U. S., 145) Mr. Justice Peckham, referring to the ground on which the appeal had been taken here, said :

> "There being room for doubt in regard to the soundness of such contention, counsel also took an appeal to the Circuit Court of Appeals, and we think that, by this action, he did not waive any right of appeal which he would otherwise have had."

II.

The Motion to Affirm.

We think we have shown that there is not even a color of right to a dismissal in this case. That being true, the court will not consider the motion to affirm.

Whitney v. *Cook*, 99 U. S., 607.
Davies v. *Corbin*, 113 U. S., 687.

Aside from the application of this rule, we think it will be seen that the motion to affirm in this case ought not to be entertained. Under the rule of this court, the motion to affirm must be on the ground that it is manifest that the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

At the time that this suit was brought, the plaintiff was in the possession of an exclusive franchise granted by the state, acquiesced in by the municipality, and exercised by its owner for a period of ten years. Large sums of money had been invested

upon the faith of the franchise. The corporation paid a franchise tax upon it to the City of Covington, and the City of Covington had entered into a contract with the company to light its streets, alleys and public places.

When the suit was entered a demurrer was filed to the bill, which raised exactly the questions upon which the case was finally decided on the merits. After a full hearing, Judge Evans, who heard the demurrer, overruled the same and sustained the contention of the complainant. Afterward, in the hearing upon the merits, Judge Cochran took a different view of the case from Judge Evans and sustained the contention of the City of Covington.

At the outset, therefore, the claim of appellees that this appeal is for purposes of delay, or frivolous, is met by the fact that two Judges of the Circuit Court have reached directly opposite views upon the questions in controversy in this case.

As further indicating that there is a real controversy in this case, we call the court's attention to the fact that upon the hearing upon the merits, the decision of Judge Cochran covers thirty-five pages of the printed record; that the court did not enter judgment upon rendering the original opinion, but allowed the the case to rest from June 17th, 1902, to October 2d, 1902, to give complainant an opportunity to make an oral argument on the rehearing, and on said rehearing filed a written opinion which covers five pages of the printed record.

Moreover in the final decree in the case finding against the contention of the complainant, the court nevertheless continued the injunction in force pending an appeal.

All this indicates that in the opinion of the Judge who decided the case against us, the questions at issue are serious, and are questions upon which we are entitled to have the judgment of this court before the *status quo* should be disturbed.

These are the external signs of the important, serious and real character of the questions involved in this case.

An examination of the questions themselves will lead to the same result. The court below held that The Covington Electric Light Company obtained a valid exclusive franchise from the state of Kentucky. That such exclusive franchise was not re-

pugnant, when obtained, to any provisions of the laws or the Constitution of Kentucky.

Louisville Gas Co. v. *Citizens Gas Co.*, 115 U. S., 683.

The court further held that prior to April 11th, 1894, when the consolidation took place between The Covington Electric Light Company and the other two companies heretofore mentioned, The Covington Electric Light Company was still in full, complete and rightful possession of said exclusive franchise.

But the court was of opinion that the consolidation of the three companies, while it carried into the consolidated company the franchise of The Covington Electric Light Company to supply electric light to the City of Covington and its inhabitants, did not carry with it the exclusive feature of said franchise.

We claim and we confidently expect to show to this court upon the hearing upon the merits, that this exclusive franchise was an entirety ; that it was property, and that under Section 556 of the Kentucky Statutes, heretofore quoted, it passed by the consolidation to the new company.

Philadelphia & Wilmington R. R. Co. v. *Maryland*, 10 Howard, 376.
New Orleans Gas Co. v. *the Louisiana Light Co.*, 115 U. S., 650.

The court further held that, whatever the effect of the consolidation, the exclusive feature of this franchise (though not the remainder thereof) was repealed by Section 573 of the Kentucky Statutes, heretofore quoted, but which we quote again at this point as it is a novel piece of legislation :

> "The provisions of all charters and articles of incorporation, whether granted by special act of the General Asssembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897."

These were the points, and the only points, upon which the court decided the case against the plaintiff (Record, page 81).

We claim that Section 573 only relates to such matters as are within the purview of the chapter in question and embraced within its general purposes, viz., matters of the organization and the powers of a corporation, the powers of its officers and the rights and liabilities of its directors and stockholders, but that it does not relate to such a property right as an electric franchise.

We have said enough to indicate to the court the serious character of the questions involved in this case, and to demonstrate that this appeal is not frivolous nor for purposes of delay. On the contrary, we think it is apparent that both of the motions filed in this case are entirely without foundation and based upon an utter misconception of the rules of this court.

All of which is respectfully submitted.

MILLER OUTCALT,
RICHARD P. ERNST,
ALFRED C. CASSATT,
Attorneys for Appellants.

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JAMES H. McKENN

No. 246

U. S. SUPREME COURT

CHARLES H. SHAW, Trustee, et al.,
Appellants,

vs.

THE CITY OF COVINGTON et al.,
Appellees.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO ADVANCE.

MILLER OUTCALT,
RICHARD P. ERNST,
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Attorneys for Appellants.

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UNITED STATES SUPREME COURT.

CHARLES H. SHAW, TRUSTEE, et al.,
Appellants,
vs.
THE CITY OF COVINGTON et al.,
Appellees.
No. 649.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO ADVANCE.

The appellees have filed a motion in this case that it be advanced for hearing. After setting forth in a general way the nature of the action, and the questions involved, counsel for appellees says:

"The reasons for this application are: That the matters involved herein are of great public interest to the State of Kentucky, and the citizens and taxpayers thereof. It is important to all municipalities in the State of Kentucky, and the citizens and taxpayers thereof, and to all private corpora-

tions, that the law as to exclusive franchises and privileges in Kentucky should be speedily settled.

Wherefore the appellees, City of Covington, and William A. Johnson, Mayor, pray that this cause be advanced and heard at as early a date as may be convenient and proper under the rules of court. The injunction is still in force and effect, preventing appellee city from issuing bonds and constructing said municipal electric light plant."

The language just quoted is the only language in the motion which purports or attempts to state a reason why the cause should be advanced.

There are no facts alleged which show that the matters involved in this action are of great public interest to the State of Kentucky. So far as this record, including the motion, show, there are no other exclusive franchises in the State of Kentucky, and there are no allegations of fact showing that the law as to exclusive franchises in Kentucky requires a settlement, speedy or otherwise.

The fact that the injunction is still in force preventing the appellee from issuing bonds and constructing a municipal light plant, thus violating the terms of the franchise claimed by the appellants, is not, as we understand the matter, a recognized ground for advancing the cause. It does not appear that the enforcement of this injunction is any hardship to the city of Covington, or that it is suffering financial or other loss thereby.

Under Rule 26 of this Court it is provided that the following classes of cases may be advanced: criminal cases, cases once adjudicated and again brought up, and revenue and other cases in which the United States are concerned, which also involve some matter of general public interest. Section 7 of said rule provides as follows:

"No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the Court."

We submit that in this case there have been no special or peculiar circumstances shown to the Court which require the advancement of the case.

All of which is respectfully submitted.

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